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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

PUBLIC INTEREST RESEARCH GROUP, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1434

PUBLIC INTEREST RESEARCH GROUP, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Public Interest Research Group, Environmental Law Institute, Michael A. Aisenberg and Paul F. Macri ("PIRG") hereby pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the First Circuit entered in this case on August 18, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-15a) is not yet reported.* The opinions of the Federal Communications Commission are reported at 40

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* A copy of the Joint Appendix filed with the First Circuit is being lodged with the Clerk of this Court for the convenience of the Court.

FCC2d 115 (App. B, *infra*, pp. 16a-22a), 48 FCC2d 615 (App. C, *infra*, pp. 23a-27a) and 49 FCC2d 411 (App. D, *infra*, pp. 28a-29a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission violated Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. § 315, or the National Environmental Policy Act of 1969, when it ruled that the fairness doctrine is inapplicable to product advertising.

STATUTES INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the

> presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from *the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*[1]

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332, provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall— . . . (F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment.

STATEMENT OF THE CASE

This case concerns a seminal ruling of the Federal Communications Commission ("FCC" or "the Commission") that if radio and television advertising promotes products which have a demonstrable adverse environmental impact and are a threat to public health and

[1] This italicized portion is referred to as a licensee's fairness doctrine obligation.

safety, then even though the sale and use of such products is a concededly controversial issue of public importance in a community, neither the fairness doctrine as codified in Section 315 of the Communications Act nor the National Environmental Policy Act of 1969 ("NEPA") requires that the public be exposed to contrasting views on the controversy.

In late 1972 and early 1973, station WMTW-TV, Poland Spring, Maine, aired hundreds of ads that urged the sale and use of snowmobiles at a time when the state legislature and the people of Maine were embroiled in a controversy to regulate, for the first time, the sale and use of these machines. These ads argued that snowmobiles were fast, power-packed vehicles that ran quietly and safely over mountain trails and hilly wilderness terrain, thus affording the type of family fun and entertainment that makes winter "just one big fun-filled season." (p. 3a, n. 2). When the station refused the request of three Maine residents to afford a reasonable opportunity for the presentation of contrasting views on the controversial and publicly important issue of snowmobile purchase and use, they complained to the FCC that the station was acting in violation of the fairness doctrine as codified in Section 315 and as incorporated by NEPA.[2]

The Maine residents argued and comprehensively documented the fact that snowmobiles are luxury vehicles which pose significant safety dangers to their riders and passers-by; that they create a serious adverse environmental impact which results in the death of wild-

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[2] The Maine residents did *not* request that counter-ads or similar spot programming be aired. They urged only that some "reasonable opportunity" for hearing opposing views be afforded, be that by newscasts, public affairs shows, documentaries, interview programs, etc. In short, the broadcaster was afforded under the fairness doctrine enormous latitude to decide the format and spokespersons for the presentation of opposing views.

life and destruction of vegetation; and that they invade the privacy rights of other land users and home owners. The Maine residents catalogued the extensive nature of the snowmobile controversy: the United States Subcommittee on Parks and Recreation had held hearings on snowmobiling; President Nixon had ordered the curtailment of the use of these vehicles on public lands; the United States Department of the Interior had proposed rules restricting snowmobile use in national forests and parks (including many in Maine); the Maine legislature was considering for the first time legislation to limit both the types of snowmobiles which could be bought and the zones in which they could be used; and there were heated public meetings throughout Maine sponsored by governmental and private bodies to debate the proposed legislation and arrive at a solution to the problems associated with snowmobiling.

The Maine residents noted that the snowmobile controversy was discussed in *Consumer Reports*, *Sports Illustrated*, numerous environmental publications and, most significantly, Maine newspapers and stations other than WMTW-TV. For example, the complainants quoted from the headline story in the December 3, 1972 *Maine Sunday Telegram*, the state's largest Sunday paper, entitled "Snowmobiles: New Laws Needed?":

> When it comes to snowmobiles, people generally have pretty strong opinions one way or another. Depending upon your point of view snowmobiles are:
>
> —Noisy and dangerous contraptions that destroy both property and peace of mind, or . . .
>
> —Wonder machines promoting family fun and freeing body and spirit to explore once inaccessible delights of nature.

The Maine residents argued that by failing to provide a reasonable opportunity for the presentation of views con-

trasting with those in the snowmobile ads,[3] WMTW-TV was in violation of the fairness doctrine. Specific reliance was placed upon *Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute* v. *Federal Communications Commission*, 396 U.S. 842 (1969) (*"Banzhaf"*); *Retail Store Employees Union* v. *Federal Communications Commission*, 436 F.2d 248 (D.C. Cir. 1970) (*"Retail Store"*); *Friends of the Earth* v. *Federal Communications Commission*, 449 F.2d 1164 (D.C. Cir. 1971) (*"Friends"*); and *Neckritz* v. *Federal Communications Commission*, 502 F.2d 411 (D.C. Cir. 1974) (*"Neckritz"*).

The Commission's staff, without even examining the texts of any snowmobile ads, ruled that the fairness doctrine did not apply to "ordinary product commercials" which "advance a claim for product efficacy or social utility." (p. 20a).[4] The Commission affirmed the staff decision, ruling that "all product advertising extolls the virtues of the product in order to convince the public to buy." (p. 25a). While the Commission conceded that the purchase and use of snowmobiles may constitute a controversial issue of public importance in Maine, it stated that the snowmobile ads were merely "standard

[3] The only programming aired by WMTW-TV which provided views contrary to those in the snowmobile ads was a one-half-hour interview program featuring opponents and proponents of the bills in the Maine legislature. There is no question that if the hundreds of snowmobile ads give rise to fairness obligations, the station's single program was insufficient to meet its duty to present opposing views. *See, e.g., Citizens for Responsible Government—KTOW*, 25 FCC2d 73 (1970). Neither the Commission nor the First Circuit reached the question of whether the station met its fairness obligation because they both found the fairness doctrine inapplicable.

[4] The terms "ordinary product commercials" or "standard product commercials" were used extensively by the Commission and the lower court. These terms do not mean that the product being promoted is not highly controversial. Rather, they are used generically to describe ads for both controversial and non-controversial products.

product commercials" which were not "devoted in an obvious and meaningful way" to the discussion of that issue. (p. 26a). It rejected the claims that Section 315 and the cases cited by the Maine residents require an opposite result, noting that in its *1974 Fairness Report*, 39 Fed. Reg. 26372 (July 18, 1974), the Commission had expressly disowned the Court of Appeals decisions in *Banzhaf* and its progeny. In its initial ruling and in an opinion denying reconsideration (pp. 28a-29a), the Commission failed to discuss the arguments of the Maine residents and PIRG that NEPA required that the fairness doctrine be applied to the snowmobile ads.

Upon a petition for review filed by PIRG, pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), the United States Court of Appeals for the First Circuit affirmed the Commission's ruling that snowmobile commercials were usual product ads which "contribute '*nothing* to public understanding' " and thus could not "reasonably be said to inform the public on any side of a controversial issue of public importance." (p. 9a) (emphasis added). Consequently, the First Circuit agreed with the Commission that the fairness doctrine was inapplicable because standard product ads are not "devoted in an obvious and meaningful way" to a discussion of any controversy—here, the snowmobile controversy in Maine. The First Circuit recognized the Commission's decision was inconsistent with prior Commission and court rulings on standard commercials for other controversial products, but it found that the Commission could reject the prior rulings without violating either Section 315 or NEPA.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's Decision Is In Conflict With Both Prior Decisions of the U.S. Court of Appeals for the D.C. Circuit Which Addressed the Same Issues[5] and With Decisions of This Court Which Rejected the Rationale Adopted by the First Circuit.

A. *The First Circuit's Decision Conflicts With Decisions of the D.C. Circuit.*

The First Circuit explicitly stated that the Commission's decision in this case was contrary to the interpretation of the fairness doctrine as expressed in three decisions of the D.C. Circuit. *Banzhaf, supra; Friends, supra*; *Neckritz, supra.*[6] It rejected the argument that there are statutory or constitutional barriers to the Commission's abandonment of these precedents.[7]

In *Banzhaf, supra*, the D.C. Circuit upheld the Commission's ruling that because product ads for cigarettes argued the desirability of smoking, the fairness doctrine

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[5] The July, 1974 *Fairness Report* does not dispel the very real conflict between the D.C. Circuit decisions holding that product commercials are subject to the fairness doctrine and the First Circuit decision that they are not. The underlying issue remains unchanged: whether Section 315 and the public interest standard of the Communications Act require application of the fairness doctrine to product ads which raise one side of a controversial issue of public importance. Moreover, the Commission based its decision on Commission precedent which pre-dated the *Fairness Report*, observing that the *Fairness Report* merely affirmed prior policy. (p. 26a).

[6] The lower court did not discuss *Retail Store, supra*, which was cited by PIRG.

[7] PIRG's constitutional argument was that the First Amendment precluded the Commission from extinguishing the rights of the public to receive information on opposing sides of the snowmobile controversy. Of course, the public interest standard of the Communications Act refers to the same First Amendment principles. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122 (1973).

and Section 315 required the presentation of contrasting views.[8] The court affirmed the Commission's statement that the "ruling is really a simple and practical one, *required* by the public interest" standard of the Communications Act. 405 F.2d at 1092 (emphasis added).

When the Commission refused to apply the fairness doctrine to product commercials which urged the patronage of a local department store at the same time that a mass boycott had been arranged by a striking labor union, the D.C. Circuit in *Retail Store, supra,* relied on *Banzhaf* in rejecting the FCC's argument that the fairness doctrine was inapplicable to product ads.[9] The court also found that just as the public interest standard interpreted in *Banzhaf* must include consideration of the public health, that same standard must be deemed to incorporate the "public policy" of equalizing the "economic bargaining power between workers and their employers" that is guaranteed in the National Labor Relations Act. 436 F.2d at 259.

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[8] The Commission ruled that "[t]he advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that, however enjoyable, such smoking may be a hazard to the smoker's health." *WCBS-TV,* 8 FCC2d 381, 382 (1967), quoted in *Banzhaf, supra,* 405 F.2d at 1086.

[9] The court remanded the case to the FCC with the following guidelines: "Central to the Union's argument . . . is the proposition that, in urging listeners to patronize [the store], [the advertiser] presented one side of a controversial issue of public importance. [The store's] copy, *of course,* made no mention of the strike or boycott, or of the unresolved issues between the Union and the store. But the advertisements did urge the listening public to take one of the two competing sides on the boycott question—they urged the public to patronize the store, i.e., not to boycott it. It seems to us an inadequate answer to this argument merely to point out that [the store's] copy made no specific mention of the boycott." 436 F.2d at 258 (emphasis added).

Subsequently, in *Friends, supra*, the D.C. Circuit overturned a Commission decision which refused to apply the fairness doctrine to product ads for large automobiles which were aired on New York City stations at the time the city was considering several controversial alternative plans for the alleviation of severe pollution and transportation crises.[10]

Finally, in upholding the FCC's refusal to apply the fairness doctrine to product ads for Chevron F-310 gasoline, the D.C. Circuit merely stated that the complainants did not clearly articulate the controversial issue which they alleged was discussed in the ads. *Neckritz, supra*, 502 F.2d at 417-418. Refusing to accept the FCC's broader argument—accepted in this case by the First Circuit—that product efficacy or social utility could never be a controversial issue of public importance and that product ads do not contribute to debate on such controversies, the D.C. Circuit strongly reaffirmed its prior rulings in *Banzhaf* and *Friends* that the fairness doctrine must be applied to ordinary product ads which make an "attempt to glorify conduct or products which endanger public health or contribut[e] to pollution." *Id.* at 418.

Despite the four D.C. Circuit cases argued to the First Circuit, the lower court determined that those contrary decisions were not binding on the Commission. Hence, this Court should review the First Circuit decision to resolve the existing conflict.

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[10] The D.C. Circuit stated that "commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick getaway do, it seems to us, ventilate a point of view which not only has become controversial but involves an issue of public importance." 449 F.2d at 1169.

B. *Decisions of This Court Confirm That, Contrary to the Rulings By the FCC and First Circuit, Ordinary Product Advertisements Do Contain Messages on Controversial Issues.*

The First Circuit also affirmed the Commission's ruling on the grounds that "standard product commercials" cannot be "devoted in an obvious and meaningful way" to the discussion of controversial issues. (p. 5a). Or, as the Commission stated, "standard product commercials" merely "advocate the use of one product over another" and cannot constitute an issue of public importance. (p. 26a). However, in approving the Commission's decision that such commercials "contribute 'nothing to public understanding'" (p. 9a), the First Circuit ignored important precedent of this Court which undermines the rationale that standard product advertising cannot contain messages on controversial matters.

While this Court has never addressed the matter of the application of the fairness doctrine to product advertising, its first discussion of the fairness doctrine reaffirmed the right of the public to receive opposing views on all controversial issues of public importance raised in a station's programming. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969) ("*Red Lion*"). Later in *Columbia Broadcasting System, Inc.* v. *Federal Communications Commission*, 412 U.S. 94, 128 (1973), this Court gave express recognition in the context of the fairness doctrine to the "effects of the ubiquitous commercial":

> Broadcast *messages* . . . are 'in the air'. . . . It is difficult to calculate the subliminal impact of this *pervasive propaganda*, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word. *Id.*, quoting from *Banzhaf*, *supra*, 405 F.2d at 1100-1101 (emphases added).

In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), Mr. Justice Brennan, joined by Mr. Justice Stewart, Mr. Justice Marshall and Mr. Justice Powell, stated that "commercial advertising . . . often communicate[s] information and ideas found by many persons to be controversial." *Id.* at 314 (dissenting opinion).[11] In fact, Mr. Justice Brennan gave what he considered to be an important example, clearly applicable in the fairness context of this case, of how the ordinary product ad can involve "controversial or unsettling speech" when he referred to the unfairness of

> [an] instance, [in which] a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected. *Id.* at 317.[12]

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[11] The Court's prevailing plurality opinion differed from the dissenting opinion only on the question of whether advertising space on a public bus constituted a public forum. The prevailing plurality opinion did not take issue with Mr. Justice Brennan's characterization of commercial advertising as imparting information on controversial matters. Mr. Justice Douglas concurred with the prevailing plurality on a different ground, but he too recognized that "[c]ommercial advertisements may be as offensive and intrusive . . . as any political message." 418 U.S. at 308.

[12] Mr. Justice Brennan's characterization of snowmobiles finds support in this record. For instance, in both the complaint to the FCC and brief to the First Circuit, petitioners quoted the Executive Director of the Maine Audubon Society:

> [this] advertising convince[s] buyers that owning a snowmobile provide[s] free access to the whole world regardless of who own[s] the land. Any limit on when or where or how fast they [i.e., snowmobilers] can run their snowmobile is a direct attack on the *'freedom to explore winter'* that they have supposedly purchased along with their machine. "Snowmobiles: Pressure for Restrictions," *Maine Times*, September 15, 1972 at p. 6.

In their brief to the First Circuit, petitioners noted: "With snowmobile clubs constantly being formed, new snow areas rapidly

The rationale expressed by Mr. Justice Brennan's opinion in *Lehman* concerning the nature of product advertising was utilized by this Court in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). Stating that ads for an abortion clinic "involve[d] the exercise of the freedom of communicating information and disseminating opinion," this Court specifically noted that

> [v]iewed in its entirety, the advertisement conveyed *information* of a potential interest and value to a diverse audience—not only to readers possibly in need of the service offered, *but also those with a general curiosity about, or genuine interest in, the subject matter* or the law of another State and its development, *and to readers seeking reform in Virginia*. *Id.* at 822 (emphases added).[13]

Thus, in direct contrast to the rationale now recognized by this Court, the First Circuit agreed with the Commission that the snowmobile commercials were usual product ads which "contribute '*nothing* to public understanding'" and could not "reasonably be said to inform the public on *any* side of a controversial issue of public importance." (p. 9a) (emphases added).[14] The snow-

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opening up, races frequently being held, and *vigorous advertising*, snowmobiling has become part of the northern culture. . . ." "Product Injury Review—Snowmobiles," 2 CCH Consumer Product Safety Report ¶ 41,004, p. 28,014 (Dec. 1972) (emphasis added).

[13] *See also Virginia Citizens Consumer Council, Inc.* v. *State Board of Pharmacy*, 373 F. Supp. 683 (E.D. Va. 1974) (3-Judge Court), *cert. granted*, 420 U.S. 971 (1975) which recognized that price information in an ordinary product ad may, at times, be sufficiently important so that the First Amendment prevents any prohibition on its dissemination.

[14] The Commission and the lower court both ignored both the realities of advertising and of the governmental decision-making process. *No* ad for any product would ever argue that the negative claims made by the product's opponents were wrong; surely cigarette ads did not contend that cigarettes were not harmful to the health. *Cf. Retail Store, supra*, 436 F.2d at 258 ("[the store's] copy, *of course*, made no mention of the strike or boycott") (emphasis

mobile ads argued for the sale and use of a product which was the subject of several proposed bills in the state legislature that sought to impose *some* controls on a previously unregulated product, which President Nixon and the Department of the Interior ordered banned from public lands (many of which are in Maine), which

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added). Rather, all product ads emphasize the positive aspects of using the product—be they status, comfort, exercise or mere enjoyment of use. Indeed the sole purpose of product advertising is to communicate information in favor of a product as the numerous authorities cited by PIRG to the First Circuit recognize: *e.g.*, Colley, *Defining Advertising Goals for Measured Advertising Results* (New York: Assoc. of National Advertisers, 1961) p. 21; Holbrook, "A Review of Advertising Research," Appendix B to a Federal Trade Commission Report, No. 3-0420, *Advertising and the Public Interest*, April 20, 1973; Krugman, *The Impact of Television Advertising: Learning Without Involvement*, 29 Pub. Opin. Quarterly 349 (1966); Krugman and Hartley, *Passive Learning From Television*, 34 Pub. Opin. Quarterly 184 (1970).

Moreover, the positive aspects of a product, such as cigarettes or snowmobiles, as promoted by commercial messages, and the negative or harmful aspects, as pointed out by environmental or other concerned groups, constitute the very factors which must be weighed by legislators in making their determination whether the potential harm outweighs the benefit sufficiently to justify regulating the product or banning it completely. To say, as the FCC and the First Circuit have done, that these product messages are not "meaningful" or do not "obviously" promote the product's use is to overlook one of the key factors in this balancing process. Thus, when the lower court ruled that the application of the fairness doctrine to product ads would leave the public informed on only one side of the controversy (i.e., the anti-product side), it erred in refusing to recognize that the exact opposite is true—that the public is left informed on only one side (the pro-product side)—when the fairness doctrine is not applied to those ads which promote products that are demonstrably dangerous to safety, health and the environment and thus the subject of a controversial issue of public importance in the licensee's community. *Cf. Yale Broadcasting Co.* v. *Federal Communications Commission*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973) wherein the D.C. Circuit agreed (consistent with its product ad-fairness decisions) with the FCC's ruling that records which "glorify the use of illegal drugs" *do* present messages and information to youth, 31 FCC2d 377, 378, unless they are "virtually unintelligible" or contain "meaningless gibberish," *Yale Broadcasting Co., supra* at 598.

a Senate Subcommittee held extensive hearings to discuss, and which people and media in Maine (except WMTW-TV) were debating. As the Commission itself concedes, these matters go to the heart of what constitutes a controversial issue of public importance. (p. 26a). Yet none of these factors were persuasive to the First Circuit which found *no* informational value in this context in the snowmobile ads. A decision which so sharply conflicts with the rationale underlying decisions of this Court should be reviewed and reversed.

II. The First Circuit's Decision Is an Erroneous Application of the Communications Act and the National Environmental Policy Act of 1969 On an Important Issue With Broad Ramifications.

The First Circuit, without any analysis, characterized the statutory history behind Section 315 as only "generalized congressional endorsements" which do not prove that the Commission acted contrary to statute when it exempted standard product ads from the fairness doctrine. (p. 12a). Moreover, the lower court rejected the argument that NEPA has any application to the fairness doctrine so as to require that opposing views be presented to ads for products which have a demonstrably significant adverse impact on the environment.[15]

The FCC has long recognized that whenever a licensee broadcasts discussion of any "public questions," the public interest requires fair and free competition for the presentation of opposing views. *Great Lakes Broadcasting Co.*, 3 FRC Ann. Rep. 32, *rev'd. on other grounds*, 37 F.2d 993 (D.C. Cir. 1929), *petition for cert. dismissed*, 281 U.S. 706 (1930). This principle came to be in-

[15] The First Circuit erroneously stated that PIRG relied on Section 101(b) of NEPA. 42 U.S.C. § 4331(b). In fact, PIRG's primary reliance was on Section 102 of NEPA, 42 U.S.C. § 4332, particularly Sections 102(1), 42 U.S.C. § 4332(1), and 102(2)(F), 42 U.S.C. § 4332(2)(F), *neither* of which the lower court recognized.

corporated into the public interest standard of the Communications Act adopted in 1934. 47 U.S.C. §§ 307(a), 309(a), 310(b). In 1946 the Commission decided *Sam Morris*, 11 FCC 197, wherein it stated that "[t]he fact that the occasion for [a] controversy happens to be the advertising of a product [in that case, liquor] *cannot serve to diminish* the duty of the broadcaster to treat it as such an issue." *Id.* at 199 (emphasis added). Contrary to the ruling upheld by the First Circuit here, the Commission recognized that "under some circumstances" product ads can "divide the community by raising basic and important social, economic, or political issues." *Id.* at 198. Hence, when in 1949 the FCC formalized the fairness doctrine in a single document entitled *Editorializing by Broadcast Licensees*, 13 FCC 1246, 1249-1250, it reaffirmed the principle that the fairness doctrine fully applies to "all subjects of substantial importance to the community" with specific reference to *Sam Morris*.

While there are no reported product ad cases between 1949 and the 1959 Congressional amendment to Section 315 which codified the fairness doctrine, in 1952 the FCC Acting Chairman reported to Congress that the fairness doctrine must be understood as applying to product ads under some circumstances:

> [W]hat is for some individuals merely a routine advertising 'plug' extolling the virtues of a [product], essentially no different from other types of products advertised, is for other individuals the advocacy of a practice which they deem to be detrimental to our society . . . the fact that the occasion for the controversy happens to be the advertising of a product *cannot serve to diminish* the duty of a broadcaster to treat it as [a controversial issue of public importance]. *Hearings on S.2444 Before the Senate Committee on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. 7 (1952) (emphasis added).

During the debates on the 1959 amendments to Section 315, several members of Congress remarked that the fairness doctrine was "intended to encompass all legitimate areas of public concern which are controversial." 105 Cong. Rec. 17831 (Sen. Scott).[16] No attempt was made to upset the FCC's ruling that product ads—the major source of revenue for the industry—were subject to fairness obligations in some circumstances. Thus, the final legislative product in Section 315 expressed a clear and binding intent to *continue* the application of the fairness doctrine to all controversial issues, including the social utility of a product as advanced in product ads. The First Circuit erred in reading this legislative history.[17] *Fairness, Freedom and Cigarette Advertising: A Defense of the Federal Communications Commission,* 67 Colum. L. Rev. 1470, 1474 (1967).

Since 1959, the Commission has reaffirmed the general rule that the fairness doctrine does apply to product advertising. In its *Public Notice on Controversial Issue Programming—Fairness Doctrine,* 25 P & F Radio Reg. 1899, 1900 (July 26, 1963), the FCC stated that "[i]n determining compliance with the fairness doctrine [it]

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[16] *See also* 105 Cong. Rec. 14457 (Sen. Douglas); 105 Cong. Rec. 14462 (Sen. Pastore); S. Rep. No. 562, 86th Cong., 1st Sess. 13 (1959).

[17] The First Circuit erroneously accepted the Commission's argument that "[w]hen the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission." *Red Lion, supra,* 395 U.S. at 385. Certainly, Congress could not have been presumed to have ratified the myriad applications of the fairness doctrine to every particular fact situation. It is equally clear, however, from this Court's reference to the absence of a "free hand for the future" and from the legislative history of the 1959 amendments, that Congress did not intend to permit the Commission to undercut the broad general principles behind the fairness doctrine by either excluding from it certain controversial issues of public importance or else by carving out special rules for product ads.

looks to substance rather than to label or form."[18] The general principle was applied to cigarette ads in 1967, *Applicability of the Fairness Doctrine to Cigarette Advertising*, 9 FCC2d 921 (1967), and of course, as previously mentioned, reaffirmed by every lower court decision that addressed the matter—with the exception of the First Circuit opinion at bar. Most significantly, Congress has expressly refused to pass legislation which would exempt product ads from the fairness doctrine and Section 315.[19] "[C]ongressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). *See also Red Lion, supra*, 395 U.S. 381-382. The First Circuit gave no reasons why it departed from these principles of legislative interpretation in upholding the wholesale exclusion of all standard product advertising from the fairness doctrine.

The lower court also dismissed in one paragraph the serious claim that NEPA requires the application of the fairness doctrine to ads for products with demonstrably significant adverse health and environmental consequences. Assuming the First Circuit was correct in deciding that the FCC could retreat from a general rule

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[18] The 1963 Public Notice was further explained in 1965 by FCC Chairman Henry and Commissioner Cox as recognizing that "[i]t is immaterial whether a particular program is . . . a paid announcement. . . . Regardless of label or form, if one viewpoint on a controversial issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint or viewpoints." *Mrs. Madelyn Murray*, 40 FCC 647, 648 (1965) (concurring opinion). *See also Living Should Be Fun*, 33 FCC 101 (1962) wherein "programs" which were thinly disguised facades for product advertising were subjected to the fairness doctrine.

[19] H.R. 11531, 90th Cong., 1st Sess. (1967); H.R. 11615, 90th Cong., 1st Sess. (1967); H.R. 11617, 90th Cong., 1st Sess. (1967); H.R. 381, 91st Cong., 1st Sess. (1969).

that the fairness doctrine applies in appropriate instances to advertising for any product, the lower court erred when it refused to recognize that Congress did not intend to exclude the fairness doctrine from its express directive that "to the fullest extent possible . . . policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with [NEPA]." 42 U.S.C. § 4332(1). *See also* 42 U.S.C. § 4332(2)(F). If the FCC's application of the fairness doctrine is statutorily and constitutionally permissible, *Banzhaf*, *supra*, then NEPA requires that the doctrine and Section 315 be fully extended to cover products which are at the core of important public controversies and which have serious adverse environmental consequences. The Commission's decision, affirmed by the First Circuit, deprives the public of vital information concerning the desirability of purchasing and using these products.

The First Circuit's decision represents an enormous setback to informing the public in those situations where there is a controversial issue of public importance over the sale and use of a product. The First Circuit destroyed the applicability of the fairness doctrine by accepting the FCC's arguments that since *all* products are *somewhat* controversial, then it is *never* possible for debate over the social utility of *any* product to rise to the level of a controversial issue of public importance.[20] Under the lower court's ruling, stations in Detroit, Michigan are free to air commercials for guns and ammunition, licensees in Richmond, Virginia can air ads for abortion services, and broadcasters in Portland, Maine can air ads

[20] This "floodgates" argument is much like saying that because all issues can be considered somewhat controversial in some context, no issue can ever rise to the level of being a controversial issue of public importance according to the guidelines set forth by the FCC. *1974 Fairness Report*, *supra*, 39 Fed. Reg. at 26376. That interpretation would, of course, totally destroy the fairness doctrine.

for snowmobiles, without providing contrasting views, even if the sale and use of those products (or services) is one of the most important controversies in any of those locales. One can next imagine the FCC extending this ruling to ads on behalf of candidates by concluding that the fairness doctrine does not apply to allow spokespersons for opposing candidates to obtain airtime because the first candidate's ad contained merely a "meaningless" message that he or she should be elected for being a decent person. In light of the First Circuit's erroneous interpretation of legislative history, which has resulted in the elimination of the public's right to receive information on controversial issues that can arise about particular products, the lower court's ruling should be reviewed and reversed.

CONCLUSION

For the above reasons, certiorari should be granted.

Respectfully submitted,

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